UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

March 29, 2000

In re Investigation of Conoco, Inc. OCAHO Investigative Subpoena No. 20S00035

ORDER DENYING MOTION FOR A PROTECTIVE ORDER

I. BACKGROUND AND PROCEDURAL HISTORY

On March 3, 2000, Conoco, Inc. filed a motion for "Protective Order Regarding Use of Conoco Personnel Files," in which it requested that I issue an order regarding "the use of privileged personnel information contained in certain spreadsheets made available to the Office of Special Counsel" during the captioned investigation. The precise nature of the "privilege" Conoco thought applied to the information was not elaborated,[1] nor was the information itself further described. Conoco did not include a copy of the documents for *in camera* review.

The motion requested that I issue a protective order "containing a clause specifying that the protected documents provided to the Office of Special Counsel (OSC) are to be used only in connection with this investigation and potential future litigation before the Office of the Chief Administrative Hearing Officer (OCAHO) and for no other purpose." Conoco also requested that the order have a provision to ensure that "OSC will not disclose the protected documents to some other party, whether inside or outside the government, to be used for some other purpose outside this investigation and potential future litigation." As grounds for its proposed order, Conoco said it was needed in order to protect the respondent from "the annoyance, embarrassment, oppression or undue burden of potential lawsuits arising from claims of breach of confidentiality or other similar claims by individual employees named in the documents, who are not a party to the investigation or case." Why and under what authority Conoco believed its employees might sue it for giving information to OSC was unexplained.

Conoco also stated that it had sought, but been unable to obtain, OSC's consent to its proposed protective order, a copy of which accompanied the motion. Although the motion itself referred to

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[1] It is clear on the highest authority that there is no general privilege afforded to personnel records, even to confidential tenure peer-review materials maintained in an academic setting. University of Pennsylvania v. EEOC, 493 U.S. 182, 191 (1990).

information in spreadsheets made available to OSC, Conoco's proposed protective order was much more broadly worded and referred to "the production of information that the parties may consider to be sensitive, confidential, personal, proprietary, and/or protected by a statutory or other legal privilege." The proposed order indicated further that the restriction sought against disclosure was intended to include, but not be limited to "information about employee personnel and discipline matters, employee compensation and benefits, and other confidential information protected by the attorney-client privilege." The limitations in the proposed order reached well beyond the "personnel files" referred to in the caption of Conoco's motion, well beyond the spreadsheets referred to in the motion itself, and well beyond the subject investigation, purporting instead to extend to "all information tendered in discovery, including, but not limited to, initial disclosures, investigatory materials or information, documents produced, testimony taken in depositions, exhibits, interrogatory answers, and responses to requests for production" in unnamed cases. Further, the proposed order purported to restrict OSC's use of any of the information to use exclusively in an individual action on behalf of James W. Granath.[2]

Nowhere in Conoco's motion was there mention of the fact that on February 16, 2000, I had already issued an order denying Conoco's motion to quash OCAHO Administrative Subpoena No. 20S00035 issued in the same investigation, and had authorized OSC to seek enforcement of that subpoena in the United States District Court for the Southern District of Texas, Houston Division. In re Investigation of Conoco, Inc., 8 OCAHO 1048, at 8 (2000).[3] On March 3, 2000 Conoco made a telephoned request that its proposed protective order be issued that day; when informed that I was not in the office, Conoco requested that it be issued that same day by a different

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[2] The subject investigation was initially commenced with respect to two charges, one filed by David Stemler and the other by Granath. Investigation of the Stemler charge was concluded first; OSC and Stemler both filed complaints with this office respecting it. United States v. Conoco, Inc., OCAHO Case No. 20B00041; Stemler v. Conoco, Inc., OCAHO Case No. 20B00042. Conoco's proposed order would appear to preclude OSC's use of the unidentified information in connection with the Stemler litigation as well as its disclosure to other Justice Department attorneys, to other government agencies such as EEOC, to charging parties other than Granath, to their attorneys and agents, or even to the individuals who allegedly are the subject of the personnel files or documents.

[3] Citations to OCAHO precedents reprinted in bound Volumes 1 and 2, Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States, and Volumes 3 through 7, Administrative Decisions Under Employer Sanctions, Unfair Immigration-Related Employment Practices and Civil Penalty Document Fraud Law of the United States, reflect consecutive pagination within those bound volumes; pinpoint citations to those volumes are to the specific pages, seriatim, of the specific entire volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 7, however, are to pages within the original issuances.

administrative law judge. It was not. Conoco was subsequently informed by telephone

that a ruling on the motion would have to await notice to the opposing party and an opportunity for OSC to express its views in response.

On March 8, 2000, prior to the expiration of OSC's deadline for responding, Conoco filed a second motion, this one captioned as a motion "for expedited prehearing confernce (sic) on motion for protective order" requesting that the 10 day time period for OSC to file a written response to its first motion be shortened. In support of this request, Conoco stated that its motion for protective order "directly relates" to OCAHO Subpoena No. 20S00035, that on March 1, 2000 it had been directed by the United States District Court for the Southern District of Texas to produce the documents named in that subpoena to OSC by March 3, 2000, and that because it had been unable to reach an agreement with OSC it had expeditiously submitted the subject motion for a protective order, but had nevertheless turned over the documents without the benefit of any order protecting the privacy interests of its employees and former employees.

Conoco's request for expedited proceedings did not disclose whether its claims of privilege, its fears of harm, or its requested restrictions on OSC's use of the subject materials had been brought to the attention of the district court. Neither did it include a copy of the district court's order. Conoco did, however, belatedly raise a new and hitherto unexpressed allegation: that annoyance, harassment, embarrassment, oppression, or undue burden or expense also "could befall Respondent as a result of the sharing of this confidential information with parties who are involved in or could potentially be involved in litigation against Respondent before other tribunals." Because it feared any sharing of information could be "prejudicial and damaging" to it, Conoco averred that therefore expedited proceedings were warranted in this "time sensitive" matter.

OSC filed its response on March 13, 2000, stating that on February 17, 2000 it had filed a Petition for Summary Enforcement of Administrative Subpoena in the District Court in Houston, Texas, that on March 1, 2000, a hearing was held at the conclusion of which United States District Judge Vanessa Gilmore issued an order finding that respondent had failed to show cause why compliance with the subpoena should not be compelled, and that the materials were therefore ordered to be delivered to OSC on or before March 3, 2000. A copy of Judge Gilmore's written order in United States v. Conoco, Inc., Civil No. 00-CV-508 (S.D.Tex., March 1, 2000), was attached. Although the order did not specifically address the question of a protective order, OSC's submission stated that during the hearing Judge Gilmore had declined to issue a protective order imposing conditions on Conoco's production of the material. OSC's
submission indicated that subsequent to Judge Gilmore's order, Conoco turned over 84 pages of

documentation in response to Items 4 and 5 of the subpoena.[4]

OSC further reported that after reviewing the documents it had concluded its investigation of the Granath charge, had made a determination not to file a complaint with respect to that charge, and that its investigative file on the Granath charge had accordingly been closed.[5] It stated further, however, that some of the same documents have been requested in discovery in United States v. Conoco, Inc., OCAHO Case No. 20B00034[6] and that some may also be relevant to and discoverable in United States v. Conoco, Inc., OCAHO Case No. 20B00041, based on the companion charge to Granath's filed by David Stemler. Granath's charge, like those underlying the Bendig and Stemler actions, arose out of Conoco's 1999 restructuring. Accordingly OSC says it should be allowed to share the fruits of its investigation with the charging parties and their attorneys in those cases. Finally, OSC tendered a more narrowly tailored protective order addressing the disclosure of personal information about Conoco's employees and former employees.

A telephonic prehearing conference was held on March 14, 2000. Oral argument was made, during the course of which Conoco indicated that it had filed its proposed protective order simply to demonstrate that it had sought to resolve the issue with OSC before filing its motion and that it was amenable to a more limited order than it had originally proposed, specifically referring for a model to the protective order which was proposed, but never finalized, during the discovery proceedings in McCaffrey v. LSI Logic Corp., 6 OCAHO 883, at 669-72 (1996). It made no response to OSC's proposed protective order. Conoco also acknowledged that Judge Gilmore had declined either to review the subpoenaed documents *in camera* or to issue a protective order respecting them.[7]

Conoco's motion is ripe for decision.

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[4] Item 1 of subpoena 20S00035 requested personnel files for six specific individuals. Item 2 requested other documents relating to five individuals. Item 4 requested documents in an electronic folder regarding selection of employees for severance during a restructuring process, and Item 5 requested an Excel spreadsheet regarding the outcome of the severance decisions. Conoco's motion to quash the subpoena was addressed only to Items 4 and 5.

[5] Granath filed his own OCAHO complaint on March 7, 2000. Granath v. Conoco, Inc., OCAHO Case No. 20B00053.

[6] Case No. 20B00034 was consolidated with Bendig v. Conoco, Inc., OCAHO Case No. 20B00033, on February 23, 2000 at which time the file denominated as 20B00034 was closed. Both these cases are now identified as Bendig v. Conoco, Inc., OCAHO Case No. 20B00033.

[7] Conoco's proposed protective order in fact bore the district court caption and civil number rather than that of the instant motion.

II. OCAHO RULES GOVERNING THE ISSUANCE OF PROTECTIVE ORDERS

OCAHO rules[8] set out two separate provisions respecting the issuance of protective orders. The first of these rules is addressed specifically to the protection of privileged communications or other classified or sensitive matter. It is set out in 28 C.F.R. § 68.42, captioned "In camera and protective orders," and provides,

> (a) Privileged communications. Upon application of any person, the Administrative Law Judge may limit discovery or introduction of evidence or enter such protective or other orders as in the Judge's judgment may be consistent with the objective of protecting privileged communications and of protecting data and other material the disclosure of which would unreasonably prejudice a party, witness, or third party.
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> (b) Classified or sensitive matter. (1) Without limiting the discretion of the Administrative Law Judge to give effect to any other applicable privilege, it shall be proper for the Administrative Law Judge to limit discovery or introduction of evidence or to enter such protective or other orders as in the Judge's judgment may be consistent with the objective of preventing undue disclosure of classified or sensitive matter. When the Administrative Law Judge determines that information in documents containing sensitive matter should be made available the Judge may direct the producing party to prepare an unclassified or non-sensitive summary or extract of the original. The summary or extract may be admitted as evidence in the record.

The rule appears to be applicable not only to discovery but at any stage of an OCAHO proceeding.

The second rule is specifically addressed to protective orders issued during the course of the discovery stage of a proceeding. It is set forth at 28 C.F.R. § 68.18(c), and provides,

> Protective orders. Upon motion by a party or the person from whom discovery is sought, and for good cause shown, the Administrative Law Judge may make any order that justice requires to protect a party or person from annoyance, harassment, embarrassment, oppression, or undue burden or expense...

This latter rule is clearly similar to Rule 26(c) of the Federal Rules of Civil Procedure, upon which it was modeled,[9] and it depends upon the same good cause standard. Because the rule is substantially

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[8] Rules of Practice and Procedure for Administrative Hearings Before Administrative Law Judges in Cases Involving Allegations of Unlawful Employment of Aliens, Unfair Immigration-Related Employment Practices, and Document Fraud. 28 C.F.R. Pt. 68 (1999).

[9] The origin of 28 C.F.R. § 68.42 is less clear. The language appears, however, to track 29 C.F.R. § 18.46 of the Rules of Practice and Procedure before administrative law judges in the

the same as the federal rule governing discovery in federal civil cases, OCAHO jurisprudence addressing discovery proceedings has historically looked to federal cases decided pursuant to Rule 26(c) for guidance in ascertaining whether a sufficient showing has been made to justify a protective order under 28 C.F.R. § 68.18(c). See, e.g., United States v. Agripac, 8 OCAHO 1017, at 3 (1998); United States v. Clark, 5 OCAHO 771, at 389 (1995); United States v. Guardsmark, Inc., 4 OCAHO 614, at 251 (1994).

Although Conoco's motion for protective order purported to rely on the rule set forth at 28 C.F.R. § 68.42(a), it also referred generally to Rule 26(c)(7) of the federal rules, and as grounds for a protective order cited as well to the language used in 28 C.F.R. § 68.18(c) regarding annoyance, embarrassment, oppression or undue burden. While these rules provide administrative law judges with broad discretion to issue such protective orders as justice may require in OCAHO proceedings, 28 C.F.R. §§ 68.18(c) and 68.42, this discretion does not mean that broad protective orders are routinely issued simply at the request of a party. Agripac, 8 OCAHO 1017, at 2-3. Neither does it mean that these rules necessarily have application to matters outside the context of a pending OCAHO proceeding. While the parties here appear to assume that the rules cited are applicable to the instant motion, I am not so persuaded.

III. APPLICABILITY OF OCAHO RULES TO CONOCO'S MOTION

There is a threshold problem. Before addressing the merits of Conoco's motion, it is first necessary to examine the question of whether and on what authority the motion can be entertained at all. It is far from clear that a respondent who fails to raise particular objections in a timely manner in a petition to revoke or modify a subpoena, and who subsequently becomes the subject of an unrestricted order by a district court to comply with the subpoena and to produce the materials sought, may then assay a third successive bite of the same apple after OSC's investigation is terminated by putting forth a new set of objections and requesting a protective order in this forum covering the very materials unrestricted production of which was already compelled by the district court.

OCAHO administrative law judges have no inherent general authority to supervise, oversee or direct OSC's investigative and charge processing procedures, its determinations, or the disposition of investigative materials in its custody. The OCAHO Rules of Practice and Procedure are, as their name suggests, addressed to and applicable to administrative hearings before administrative law judges in cases involving allegations of unlawful employment of aliens, unfair immigration-related employment practices, and document fraud. 28 C.F.R. § 68.1 ("The rules of practice in this part are applicable to adjudicatory proceedings before Administrative Law Judges"). "Adjudicatory proceeding" is defined as "an administrative judicial-type proceeding, before the Office of the Chief Administrative Hearing Officer, commencing with the filing of a complaint and leading to the formulation of a final agency

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Department of Labor. 29 C.F.R. Pt. 18 (2000).

order." 28 C.F.R. § 68.2 (emphasis added). The rules create no broad independent supervisory authority for administrative law judges to oversee agency investigations, whether by OSC or by the INS in conducting investigations dealing with unlawful employment or document fraud. For most purposes, these rules clearly contemplate that OCAHO proceedings are commenced, and the authority of this office is invoked, by the filing of a complaint.

The one exception provided in the rules, and the one role assigned to administrative law judges in investigations, is the limited authority described in 28 C.F.R. § 68.25(a) and (c): the authority to issue such subpoenas as are authorized by statute, either prior to or subsequent to the filing of a complaint, and the authority to entertain and make determinations on a petition to revoke or modify such a subpoena. It is well settled, moreover, that the role of an adjudicative forum in proceedings to enforce an investigatory subpoena is "sharply limited." In re Investigation of Valley Crest Tree Co., Inc., 3 OCAHO 579, at 1780 (1993).

The rules provide that after the issuance of an administrative subpoena, any person intending not to comply with it has ten days after the service of the subpoena in which to petition to revoke or modify it. 28 C.F.R. § 68.25(c). Conoco had the opportunity to so move; its submission was untimely and otherwise failed to comply in several respects with the rules. In re Investigation of Conoco, 8 OCAHO 1048, at 2-3. After Conoco's motion to quash the subpoena was denied OSC brought an action in the appropriate forum in Houston and obtained an unrestricted order compelling production of the documents requested. United States v. Conoco, Inc., Civil No. 00-CV-508 (S.D. Tex., Houston Div., March 1, 2000).

Unlike orders enforcing subpoenas issued in connection with civil and criminal actions or grand jury proceedings, a district court's order enforcing an agency's administrative subpoena is a final order within the meaning of 28 U.S.C. § 1291, and is thus immediately appealable. 15B Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, Federal Practice and Procedure § 3914.25 (2nd ed. 1992). See United States v. Jose, 519 U.S. 54 (1996); Reisman v. Caplin, 375 U.S. 440 (1964); Ellis v. ICC, 237 U.S. 434 (1915). This is no less true in the Fifth than it is in any other circuit. See, e.g., NLRB v. Line, 50 F. 3d 311, 313 n.1 (5th Cir. 1995); EEOC v. Packard Elec. Div., General Motors Corp., 569 F.2d 315 (5th Cir. 1978). The rationale is that, at least from the district court's perspective, the proceeding "may be deemed self-contained, so far as the judiciary is concerned." Cobbledick v. United States, 309 U.S. 323, 330 (1940). Moreover, at least since Church of Scientology of California v. United States, 506 U.S. 9, 14-18 (1992), it is also clear that compliance with a district court's order by turning over the subpoenaed documents does not moot such an appeal. United States v. Chevron U.S.A., Inc., 186 F.3d 644, 647 (5th Cir. 1999).

Because Judge Gilmore's order is still appealable, it would appear that to the extent Conoco is dissatisfied with her order compelling production of the information requested in OCAHO Subpoena No. 20S00035 without a protective order, its remedy does not lie in this forum but with the Court of Appeals for the Fifth Circuit. My role with respect to the production of the documents requested in that

subpoena terminated with the issuance of an order denying the motion to quash on February 16, and authorizing OSC to seek enforcement of the subpoena in the district court. The OSC's administrative investigation has now been concluded. The matter of the subpoena is not pending before me.

The action Conoco seeks confounds basic principles of administrative law by conflating the investigative and the adjudicatory processes. Courts have long drawn clear distinctions between investigatory and adjudicatory proceedings in executive branch agencies, as explained in Hannah v. Larche, 363 U.S. 420, 445-46 (1960). In Genuine Parts Co. v. FTC, 445 F.2d 1382, 1388 (5th Cir. 1971), for example, when a parts distributor under investigation by the FTC sought to employ discovery procedures during the investigative stage and prior to the filing of a complaint, the court similarly drew the sharp distinction between the investigative and adjudicatory stages, holding that there is no switch from the former to the latter until a complaint is issued and served. The court observed that the procedural safeguards characterizing the adjudicatory process are not available at the investigative stage, noting that,

> An investigation discovers and produces evidence; an adjudication tests such evidence upon a record in an adversary proceeding before an independent hearing examiner to determine whether it sustains whatever charges are based upon it. A party under investigation may not contest the discovery and production of evidence in the same manner he may contest the use of that evidence in an adjudication by proper objection, by the introduction of other evidence, and the other safeguards traditional to an adversary proceeding under our system.

Id.; cf. Valley Crest Tree Company, 3 OCAHO 579, at 1779 ("An investigative inquiry is not a proceeding as that term is commonly understood in administrative adjudication."). Traditional discovery rules ordinarily become available only when and if an adjudicatory proceeding is instituted. They have no general applicability to investigatory procedures. Cf. Hannah, 363 U.S. at 448 (distinction between investigation and adjudication "is to prevent the sterilization of investigations by burdening them with trial-like procedures").

This is not a case like Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984), in which a newspaper obtained private financial information in civil discovery proceedings the contents of which it was on the verge of publishing. On the contrary, and contrary to Conoco's fears, OSC like any other government agency, is not at liberty to disseminate the results of its administrative investigations willy-nilly to the world at large. The right of individuals to obtain and the duty of government agencies, including OSC, to disclose investigatory or other agency records is governed by the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), and the Privacy Act of 1974, 5 U.S.C. 552a(b), as well as by other constraints.

FOIA is, of course, a disclosure statute, not a protective statute. Its general rule mandating disclosure is, however, expressly limited by two provisions dealing specifically with privacy interests. Exemption 6 protects from disclosure "personnel and medical files and similar files the disclosure of which would

constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Exemption 7 protects information compiled for purposes of law enforcement the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). A considerable body of case law has developed dealing with administrative agency disclosures under those provisions. See, e.g., Department of Defense v. FLRA, 510 U.S. 487 (1994) (exemption (b)(6)); Department of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749 (1989) (exemption (b)(7)(C)); Halloran v. Veterans Admin., 874 F.2d 315 (5th Cir. 1989) (exemption (b)(7)(c)). See also FDIC v. Dye, 642 F.2d 833 (5th Cir. 1981) (Privacy Act); Ash v. United States, 608 F.2d 178 (5th Cir. 1979), cert. denied, 445 U.S. 965 (1980) (Privacy Act). Conoco made no showing that these statutes are inadequate to protect the interests of its employees.

OSC has, moreover, entered into memoranda of understanding (MOU) agreements with other governmental agencies setting out in detail the circumstances and conditions under which information will be shared among them. Limits on OSC's disclosures of its closed investigatory files is thus already governed by both a comprehensive system of rules set out by the United States Congress for administrative agency disclosure of records generally, and by interagency agreements OSC has negotiated with other government entities. As the Fifth Circuit, in a recent administrative subpoena enforcement action, Chevron U.S.A., 186 F.3d at 650, observed in expressing its agreement with the views of the D.C. circuit,

> an agency's determinations on the protections required for confidential information are not to be lightly disregarded. See U.S. International Trade Com'n v. Tenneco West, 822 F.2d 73, 79 (D.C. Cir. 1987) ("deference [is] due an agency in choosing its own procedures for guarding confidentiality"); F.T.C. v. Texaco, Inc., 555 F.2d 862, 884 n.62 (D.C.Cir. 1977) ("it is the agencies, not the courts, which should, in the first instance, establish the procedures for safeguarding confidentiality") (citing FCC v. Schreiber, 381 U.S. 279, 290-1, 295-96, 85 S.Ct. 1459, 14 L.Ed.2d 383 (1965)).

186 F.3d at 650.

Conoco has provided no sufficient reason and pointed to no specific authority for me to interfere with OSC's own determination in the first instance of what it may appropriately disclose to the public or to other agencies or individuals under the rules ordinarily applicable to this as to any other closed investigatory record.

IV. MERITS OF CONOCO'S MOTION

Assuming arguendo that OCAHO rules were applied to Conoco's motion, the result in this case would not differ. Globalized or blanket claims of privilege as to unidentified documents are unacceptable as justification for a protective order, whatever the standard. Conspicuously absent from Conoco's submissions are objective and articulable facts going beyond broad allegations or subjective fears of

purely conjectural consequences. Conclusory allegations of confidentiality and anticipated harm without a particularized showing of what the specific information is and how likely it is to cause a specific harm do not provide a basis for a protective order. See, e.g., Agripac, 8 OCAHO 1017; In re Terra Int'l, Inc., 134 F.3d 302 (5th Cir. 1998).

Similarly, a claim of privilege is not successfully made merely by reciting the word "privilege" without either tendering the allegedly protected documents for *in camera* review or identifying them with sufficient specificity to permit a reasoned assessment by the administrative law judge of what, if any, privilege is applicable. The explanation for this is simple: the determination of whether a particular document is privileged, classified or sensitive within the meaning of 28 C.F.R. § 68.42 is not committed to the unilateral determination of the party requesting a protective order, but rather to the adjudicator. The genuineness of any alleged risk of harm to the requesting party must also be assessed by the adjudicator. Beyond the bald assertion in the motion that its employees might sue if it disclosed their personnel records to OSC, Conoco made no showing that there was any genuine likelihood of such a suit. No affidavit was tendered; no example of precedent for such a suit in the Fifth or any other circuit was cited.

Conoco's description of the materials for which it seeks protection, moreover, is sufficiently vague that it is literally impossible to tell what the documents are. The only documents actually referred to in Conoco's motion are characterized, without elaboration, as "privileged personnel information contained in certain spreadsheets made available" to OSC. No pages or contents are described with any specificity at all, nor is there an explanation of what particular privilege is alleged to apply to what portions of the spreadsheets.[10] OSC has indicated only that 84 pages were submitted after Judge Gilmore ordered Conoco to comply with the subpoena. That personnel records may be the subject of some of those records does not change the result, not only because there is no general privilege for such documents, 493 U.S. at 191, but also because personnel records of similarly situated employees are the common currency of employment discrimination investigations; it is difficult to conceive of any investigation or litigation of a discrimination case in which personnel records are not routinely requested and produced without the necessity of a subpoena.

Conoco's apparent objective might be characterized as in the nature of a preemptive strike, with the underlying purpose of preventing the use of materials obtained in the OSC investigation for purposes of litigation against it by OSC or the charging parties in like or related cases arising out of Conoco's 1999 restructuring complained of in the charges which triggered this investigation. The belatedly articulated fear that the materials might be used against Conoco in other litigation was not even raised in the initial motion for a protective order but only in the subsequent motion for expedited prehearing conference.

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[10] The confusion is further compounded by the references in Conoco's proposed protective order to "discovery," "depositions" and the like. This was an administrative investigation by OSC and it has now been closed. No "discovery" or "depositions" were conducted during the investigation.

Conoco's request for secrecy misperceives the nature and purpose of a protective order.

It is not the function of a protective order to restrict broadly in advance of litigation the use of otherwise discoverable or admissible information. Decisions about what materials are obtainable in particular litigation, how they may be obtained, what use may be made of them once obtained and under what restrictions, are decisions best made in the context of a specific case by the particular forum having jurisdiction over that case, and under its own rules. A tribunal's decisions about whether or not particular information is to be discoverable or admissible, whether in an OCAHO case, a Title VII case, or in any other litigation, are thus not appropriately foreclosed by imposing a blanket gag order at the end of the investigative stage. This result accords with the general rule that a protective order ordinarily may not be imposed upon information lawfully derived outside of a tribunal's own discovery process. Seattle Times, 467 U.S. at 34 ("a protective order prevents a party from disseminating only that information obtained through use of the discovery process. Thus, the party may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court's processes").

V. CONCLUSION AND ORDER

For the reasons stated, the motion of Conoco, Inc. for a protective order is denied.

SO ORDERED.

Dated and entered this 29th day of March, 2000.

Ellen K. Thomas
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, 2000, I have served copies of the foregoing Order Denying Motion for a Protective Order on the following individuals:

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